

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD LEWIS ELSTON,

Defendant-Appellant.

UNPUBLISHED
October 24, 2000

No. 199557
Eaton Circuit Court
LC No. 96-000134-FC

ON REMAND

Before: Cavanagh, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

This case is before us for the second time. Previously, we reversed defendant's conviction by jury of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), on the basis that the trial court abused its discretion by not providing a remedy for a discovery violation (defendant was not provided access to a laboratory report or an opportunity to inspect and/or test a wet swab sample). *People v Elston*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 1999 (Docket No. 199557). The Supreme Court subsequently vacated this Court's opinion and remanded for consideration of defendant's remaining issues. *People v Elston*, 462 Mich 751; 614 NW2d 595 (2000). We now affirm.

Defendant first argues that the trial court erred in granting the prosecutor's motion to endorse two witnesses, both of whom were not listed on the prosecutor's witness list but were listed on the information, on the first day of trial. This Court reviews a trial court's decision to permit a prosecutor to endorse a witness not listed on the list of witnesses the prosecutor intends to call at trial for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

Under MCL 767.40a(1); MSA 28.980(1) a prosecutor must attach to the information a list of all witnesses known to the prosecutor who may be called at trial and all known *res gestae* witnesses. The same statute requires the prosecutor to send to the defendant a list of the witnesses the prosecutor intends to produce at trial not less than thirty days before trial. MCL 767.40a(3); MSA 28.980(3). However, the prosecutor "may add or delete from the list of witnesses he or she intends to call at trial at

any time upon leave of the court and for good cause shown or by stipulation of the parties.” MCL 767.40a(4); MSA 28.980(4).¹ Therefore, the trial court may have erred in allowing the prosecutor to endorse the witnesses who were not included on the list of witnesses the prosecutor intended to call at trial because the prosecutor failed to show any good cause for not including the witnesses on the second list. However, after reviewing the entire record, we conclude that any possible error was harmless.

The standard of harmless error to be applied by this Court depends on whether the error complained of was constitutional or nonconstitutional in nature. *People v Carines*, 460 Mich 750, 773-774; 597 NW2d 130 (1999). If the error is a preserved, nonconstitutional error, the defendant must show a miscarriage of justice under a “more probable than not” standard. *Id.* at 774. If the error is a preserved, nonstructural constitutional error, “the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt.” *Id.* Because there is no general constitutional right to discovery in a criminal case, *Elston, supra*, 462 Mich at 765-766, we believe the error complained of is nonconstitutional. However, we conclude that the alleged error in this case does not require reversal under either of the above standards. First, the names of the witnesses were included on the information; therefore, defendant did have notice that they may be called at trial. Second, defendant admits in his brief on appeal that he knew the substance of the proposed testimony of the two witnesses. Furthermore, even disregarding the disputed testimony of the two witnesses, there was ample evidence to support defendant’s conviction. The victim’s mother testified that defendant was the only person present with the victim when the injury occurred and there was medical evidence that the injury was consistent with penetration, but not consistent with a fall.

Defendant also contends that he is entitled to resentencing because the trial court violated the principal of proportionality and departed from the recommended sentencing guidelines range for improper reasons. This Court reviews sentencing issues for an abuse of discretion by the trial court. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A trial court abuses its discretion when it imposes a sentence that is not proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Merriweather*, 447 Mich 799, 806; 527 NW2d 460 (1994); *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

¹ Our Supreme Court has described MCL 767.40a; MSA 28.980 as follows:

The prosecutor’s former obligation to use due diligence to produce any individual who might have any knowledge, favorable or unfavorable, to either side, has been replaced by a scheme that 1) contemplates notice at the time of filing the information of known witnesses who might be called and all other known res gestae witnesses, 2) imposes on the prosecution a continuing duty to advise the defense of all res gestae witnesses as they become known, and 3) directs that that list be refined before trial to advise the defendant of the witnesses the prosecutor intends to produce at trial. [*Burwick, supra* at 288-289, footnote omitted.]

We reject defendant's contention that the trial court based its departure from the recommended sentence on improper reasons. A sentencing judge may ascribe more weight to particular factors in a case than the sentencing guidelines would accord them. The judge may also consider factors the guidelines do not address. See *Milbourn*, *supra* at 660-661; *People v Naugle*, 152 Mich App 227, 237; 393 NW2d 592 (1986). Further, a sentencing court may take into consideration a defendant's attitude toward his criminal behavior and lack of remorse. *People v Steele*, 173 Mich App 502, 506; 434 NW2d 175 (1988); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). We also note that "the claim of a miscalculated variable is not in itself a claim of legal error." *People v Mitchell*, 454 Mich 145, 174-178; 560 NW2d 600 (1997).

Finally, in light of the circumstances surrounding the offense in this case, we hold that defendant's sentence does not violate the concept of proportionality. See *People v Sabin*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 187226, issued 9/26/00). As the trial court noted, defendant's rape of the very young victim in this case represents an egregious form of the crime of first-degree criminal sexual conduct. Moreover, defendant took advantage of the victim's age, size, and trust. Therefore, we conclude that the trial court did not abuse its discretion in this case.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Patrick M. Meter